FILED
AUG 11 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 246

FORD MOTOR COMPANY, HENRY FORD II, ERNEST R. BREECH, JOHN R. DAVIS, DEARBORN MOTORS CORPORATION, ERNEST C. KANZLER and SHERMAN TRACTOR & EQUIPMENT CO., INCORPORATED,

Petitioners,

v.

THE HONORABLE SYLVESTER J. RYAN, UNITED STATES DISTRICT JUDGE and HARRY FERGUSON and HARRY FERGUSON, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

	PAGE
PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT	4
REASONS RELIED ON FOR ALLOWANCE OF WRIT	8
ARGUMENT	
Summary of Argument	12
I. In decisions contrary to those of this Court and of the Courts of Appeals for the Fourth and Fifth Circuits, the Courts below misconceived the purpose and effect of Section 1404(a)	12
A. The venue privilege afforded by the Clayton Act should not prevail against the fair preponderance of the criteria designated in Section 1404(a)	12
B. The standard of convenience to parties and witnesses, in the interest of justice, prescribed by Section 1404(a) for the transfer of actions, supersedes the standards which formerly controlled dismissal of actions *forum non conveniens*	15

PAGE

II. Upon the undisputed facts presented, denial of the motions for transfer resulting from application of the standards demonstrated to be erroneous in Point I above, constituted an abuse of discretion 18

A. This case precisely parallels the *National City Lines* case 18

B. The facts before the Courts below constituted clear proof of the superior convenience of the forum to which transfer was requested 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

A. Roth Co., In re, 125 F. 2d 396 (C. C. A. 7, 1942)... 27
Amalgamated Association v. *Southern Bus Lines,* 172 F. 2d 946 (C. A. 5, 1949) 9, 11, 17
Auburn Capitol Theatre Corp. v. *Schine Chain Theatres,* 83 F. Supp. 872 (S. D. N. Y., 1949) 10
Brown v. *Insurograph,* 85 F. Supp. 328 (Del., 1949).. 10
Cohen v. *Beneficial Loan Corporation,* 337 U. S. 541 (1949) 7
Cohen v. *Young,* 127 F. 2d 721 (C. C. A. 6, 1942).... 27
Collett, Ex parte, 337 U. S. 55 (1949) 8, 14
Cullinan v. *New York C. R. Co.,* 83 F. Supp. 870 (S. D. N. Y., 1948) 9
Eastman Kodak Co. v. *South Photo Material Co.,* 273 U. S. 359 (1927) 14

PAGE

E. I. du Pont de Nemours & Co. v. *United States*, 339 U. S. 959 (1950) 7

Glasfloss Corp. v. *Owens-Corning*, Civ. 53-141, S. D. N. Y., May 5, 1950 11

Gulf Oil Corp. v. *Gilbert*, 330 U. S. 501 (1947) ..10, 16, 24

Hampton Theatres v. *Paramount Film Distributing Corp.*, 90 F. Supp. 645 (D. C., 1950) 11

Huff v. *Nashville, C. & St. L. Ry.*, 88 F. Supp. 735 (S. D. N. Y., 1949) 10

Jiffy Lubricator Co. v. *Stewart-Warner Corp.*, 177 F. 2d 360 (C. A. 4, 1949), *cert. denied*, 338 U. S. 947 (1950) 9, 11, 16

Kohut v. *Bessemer and L. E. R. Co.*, Civ. 27125, N. D. Ohio, April 3, 1950 9

Los Angeles Brush Manufacturing Corp. v. *James*, 272 U. S. 701 (1927) 12, 28

Maloney v. *New York, N. H. & H. R. Co.*, 88 F. Supp. 568 (S. D. N. Y., 1949) 10

Nagle v. *Pennsylvania R. Co.*, 89 F. Supp. 822 (N. D. Ohio, 1950) 9

National Ben. Life Ins. Co. v. *Shaw-Walker Co.*, 111 F. 2d 497 (App. D. C., 1940), *cert. denied*, 311 U. S. 673 (1940) 12

Naughton v. *Pennsylvania R. Co.*, 85 F. Supp. 761 (E. D. Pa., 1949) 10

Porta v. *Watts*, 109 F. 2d 966 (C. C. A. 10, 1940) 12

Perry v. *Atchison, T. & S. F. Ry. Co.*, 82 F. Supp. 912 (N. D. Cal., 1948) 10

Rosengren v. *Shattuck*, Civ. 9270, E. D. Pa., February 20, 1950 11

Savoia Film, S. A. I. v. *Vanguard Films*, Civ. 52-219, S. D. N. Y., January 27, 1950 11

Skultety v. *Pennsylvania R. Co.*, Civ. 50-749, S. D. N. Y., June 1, 1950 .....9, 11

PAGE

Spence v. *Norfolk & W. Ry Co.*, 89 F. Supp. 823 (N. D. Ohio, 1950) 10

Swift & Co. v. *Compania Caribe*, 339 U. S. 684 (1950) 7

Tivoli Realty v. *Paramount Pictures*, 89 F. Supp. 278 (Del., 1950) 11

United States v. *E. I. du Pont de Nemours & Co.*, 87 F. Supp. 962 (N. D. Ill., 1950), *leave to file petition for mandamus and for cert. denied*, 339 U. S. 941, *app. dismissed* 339 U. S. 959 (1950) 10

United States v. *E. I. du Pont de Nemours & Co.*, 83 F. Supp. 233 (D. C., 1949) 9, 10

United States v. *Gerber*, 86 F. Supp. 175 (E. D. Pa., 1949) 10

United States v. *National City Lines*, 337 U. S. 78 (1949) 14, 15

United States v. *National City Lines*, 334 U. S. 573 (1948) 10, 14, 16, 17, 19, 20

United States v. *National City Lines*, 80 F. Supp. 734 (S. D. Cal., 1948), *leave to file petition for cert. denied* 337 U. S. 78 (1949) 19

United States v. *National City Lines*, 7 F. R. D. 456 (S. D. Cal., 1947), *rev'd* 334 U. S. 573 (1948) .. 20

United States v. *National City Lines*, 7 F. R. D. 393 (S. D. Cal., 1947) 20

United States v. *Scophony Corp.*, 333 U. S. 795 (1948) 14

United States v. *Scott & Williams*, 88 F. Supp. 531 (S. D. N. Y., 1950) 9, 11

Virginia Metal Products Corp. v. *Cowper Co.*, Civ. 54-115, S. D. N. Y., January 23, 1950 11

Wookey v. *Waterman S. S. Corp.*, 89 F. Supp. 909 (S. D. N. Y., 1950) 11

Statutes

PAGE

Title 15 United States Code, section 22 .....3, 4, 14

Title 15 United States Code, section 29 7

Title 28 United States Code, section 1404(a) 3, 4, 7-9 12-18, 21

Title 28 United States Code, section 1254 2

Miscellaneous

Braucher, *The Inconvenient Federal Forum,* 60 Harv. L. Rev. 908 .....10, 16

Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., 1947, March 7, 1947 18

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FORD MOTOR COMPANY, HENRY FORD II, ERNEST R. BREECH, JOHN R. DAVIS, DEARBORN MOTORS CORPORATION, ERNEST C. KANZLER and SHERMAN TRACTOR & EQUIPMENT CO., INCORPORATED, *Petitioners,*	No.
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THE HONORABLE SYLVESTER J. RYAN, UNITED STATES DISTRICT JUDGE, and HARRY FERGUSON and HARRY FERGUSON, INC.	

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Second Circuit entered on May 8, 1950 (R. pp. 42, 44)*, which, pursuant to the opinion of that

*In the Court of Appeals, *Ford Motor Company, et al.* v. *Ryan,* which was concluded by judgment denying the petition for mandamus,

Court (R. p. 36), (1) denied a petition for a writ of mandamus directing the Honorable Sylvester J. Ryan, Judge of the United States District Court for the Southern District of New York, to vacate an order (R. p. 12) denying your petitioners' motions for transfer of an action brought in said District by respondents against Ford Motor Company, et al., and to transfer said action to the United States District Court for the Eastern District of Michigan, Southern Division, and (2) dismissed your petitioners' appeal from the said order of the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the District Court (R. p. 15) is reported in 89 F. Supp. 45.

The opinion of the Court of Appeals (R. p. 36) is reported in 182 F. 2d 329.

JURISDICTION

The judgment of the Court of Appeals denying the petition for mandamus was entered May 8, 1950 (R. p. 42).

The judgment of the Court of Appeals dismissing your petitioners' appeal was entered May 8, 1950 (R. p. 44).

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code (28 U. S. C. § 1254).

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is docketed as No. 21601, while *Harry Ferguson, et al.* v. *Ford Motor Company, et al.*, concluded by judgment dismissing the appeal, is docketed as No. 21682.

QUESTIONS PRESENTED

1. Whether transfer of an action pursuant to 28 U. S. C. § 1404(a) to another forum where the action might have been brought is authorized solely for the convenience of parties and witnesses, in the interest of justice.

2. Whether, in a case where transfer of the action would otherwise be appropriate under 28 U . S. C. § 1404(a), the choice by the plaintiff of any forum permissible under 15 U. S. C. § 22 should prevent such transfer.

3. Whether transfer of an action pursuant to 28 U. S. C. § 1404(a) should be refused unless there is shown to have been an abuse of the venue statute (15 U. S. C. § 22) on the part of the plaintiff in selecting the forum for institution of the action.

STATUTES INVOLVED

The statutes involved are Title 28, United States Code, section 1404(a) which provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

and section 12 of the Clayton Act (Act of Oct. 15, 1914, 38 Stat. 736, 15 U. S. C. § 22) which provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

STATEMENT

The motions for transfer were made, pursuant to 28 U. S. C. § 1404(a), in an action brought in the Southern District of New York pursuant to section 12 of the Clayton Act (15 U. S. C. § 22).

The cause in which the motions for transfer were made presents fundamentally a controversy between competing enterprises, engaged in the manufacture and sale of tractors and agricultural implements, which have at all times conducted their respective businesses in and from Detroit in the Eastern District of Michigan (Ex. A)*. They are the plaintiff Harry Ferguson, Inc. and the defendants Ford Motor Company and Dearborn Motors Corporation,—each a Delaware corporation with principal place of business in the Eastern District of Michigan (Ex. C, pp. 3-4).

Of the eleven other parties named, six, the individual defendants, Ford, Breech, Kanzler, Farrell, Davis and Cook, are resident in the Eastern District of Michigan; and two others, the defendants Browning and Pierce, who were also resident there, are deceased. Of the three named parties who are not inhabitants of the Eastern District of Michigan, one, the individual plaintiff Harry Ferguson is a British subject, resident in England; another, defendant Ohio Tractor & Implement Company is an Ohio corporation; and the third, defendant Sherman Tractor & Equipment Co., Incorporated, which joined in the motions for transfer, is a New York corporation (Ex. C, pp. 3-4, 69-70)**.

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*The exhibits to the petition for mandamus in the Court of Appeals have been certified to this Court. References marked "Ex." are to these exhibits.

**Of the named defendants Farrell, Cook and Ohio Tractor & Implement Co. have not been served with process.

The substance of the plaintiffs' claims in the action (Ex. A) may be summarized as follows: that pursuant to an oral agreement reached in Detroit in 1938 between the elder Henry Ford and the plaintiff Harry Ferguson, Ford Motor Company there made and sold to Harry Ferguson, Inc., tractors which embodied plans and designs developed by Harry Ferguson over a period of many years, and which were resold there by the Ferguson company to distributors and dealers in the various states of the United States; that following negotiations in Detroit in and before 1946, the agreement was terminated, that the defendants there conspired to destroy the Ferguson company; that thereafter Ford Motor Company, without authority from the plaintiffs, continued the manufacture of similar tractors at Detroit and sold them there to the defendant Dearborn Motors Corporation, infringing certain patents owned by Ferguson and licensed to the Ferguson company; that defendants interfered with plaintiffs' contractual arrangements with suppliers of implements, three of which are located in Detroit and none in New York (Ex. C, pp. 369-370); that the defendants hired away from the Ferguson company in Detroit a number of officers and employees who are now in defendants' service in Detroit (Ex. C, p. 358); that the defendants alienated some 26 distributors and many more dealers, formerly associated with the Ferguson company (Ex. C, pp. 365-366), and that participating to this end were two of such distributors, Ohio Tractor & Implement Co. and Sherman Tractor & Equipment Co., Incorporated, the latter now in liquidation (Ex. C, pp. 73, 170); and finally that, in part by reason of such activities of the defendants, and other alleged activities of the defendants, plaintiffs failed in their efforts to obtain public financing through the underwriting firms of Watling, Lerchen &

Co. of Detroit and F. Eberstadt & Co., Inc. of New York, and to obtain a source of supply of tractors apart from Ford Motor Company (Ex. C, pp. 15-17, 192-199).

These matters are placed in issue by denials of the defendants. Defendants have also counterclaimed charging plaintiffs with a conspiracy in this country and abroad to monopolize and restrain trade in the manufacture and distribution of tractors, to monopolize and misuse patents in connection with tractors and agricultural implements, to eliminate competition, and to injure the businesses of the defendants through a campaign of defamation (Ex. B).

Notwithstanding that section 1404(a) provides for transfer of any civil action for the convenience of parties and witnesses, in the interest of justice, and authorizes no other test, the District Court nevertheless felt impelled to qualify the plain language of the statute by stating that transfer under it is appropriate only in "the exceptional case" (R. p. 21); that "a strong balance in favor of the movant" must be shown (R. p. 22); that the transferee forum must not only be more convenient but "highly so" (R. p. 20); and that section "1404(a) only purports to correct abuses of [the venue] privilege" (R. p. 22). The District Court, therefore, denied your petitioners' motions and refused transfer although he recognized that the balance of convenience was in favor of transfer (R. pp. 26, 29).

Upon denial of the petition for a writ of mandamus to the District Court, three divergent views were expressed by the Judges of the Court of Appeals—a fact which emphasizes the need for decision by this Court of the matters here presented. Judge Swan, contrary to the majority of the Court, was of the opinion that the Court of Appeals lacked power to review the order, and expressed no opinion as to other matters (R. p. 41). Chief Judge Learned Hand

was convinced that the balance of convenience favored transfer of the action to Detroit, and that it would have been an abuse of discretion to refuse transfer but for the plaintiff's choice of another forum, which he held should prevail unless transfer will make the trial "markedly more convenient" (R. p. 41). Judge Frank was of the view that Congress by the enactment of 28 U. S. C. § 1404(a) effected no change in the standards theretofore embodied in the doctrine *forum non conveniens,* and that the balance therefore must be "strongly in favor of the defendant" to warrant transfer (R. pp. 37-38).

In short, it has been held that transfer of the action is properly refused unless standards other than those which appear in the text of the statute are met.

The present petition in so far as it seeks review of the decision of the Court of Appeals dismissing the appeal to that Court is predicated on the belief that the order of the District Court refusing transfer constituted final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. *Cohen* v. *Beneficial Loan Corporation,* 337 U. S. 541, 546-7 (1949); *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684, 688-689 (1950). The instant case is not ruled by *E. I. du Pont de Nemours & Co.* v. *United States,* 339 U. S. 959 (1950), where in an action under the anti-trust laws in which the United States was complainant a direct appeal from an order refusing transfer was dismissed. The applicable statute there was 15 U. S. C. § 29 which authorizes appeal only from *the* final decree of the District Court. The difference between that statute and the statute which controlled your petitioners' appeal to the Court of Appeals was clearly indicated in *Cohen* v. *Beneficial Loan Corporation, supra,* at p. 545:

"* * * Title 28 U. S. C. § 1291 provides, as did its predecessors, for appeal only 'from all final decisions of the district courts,' except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable."

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The decision of the District Court in the instant case and the opinions of Judges Learned Hand and Frank, holding that a privilege in the plaintiff to choose venue may operate to defeat transfer of an action to a forum favored by the preponderance of convenience, are in apparent conflict with the decision of this Court in *Ex Parte Collett,* 337 U. S. 55, 59-60 (1949) where it was held that the venue statutes defining the fora in which plaintiffs may bring actions are quite distinct from section 1404(a) which confers the right to transfer of an action properly brought. In the instant case, without consideration whether plaintiff's choice of venue was dictated by considerations of actual convenience (as obviously it was not), the mere fact of such choice has been allowed to prevail over the criteria of convenience which under the statute establish the right to transfer.[1]

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[1]Such adherence to the venue statute in disregard of the standards of the transfer statute has been a determining factor in some of the

II. Important questions of Federal law which have not been and should be settled by this Court are here involved. The proper construction of section 1404(a) with respect to the issues now tendered is obscured in a welter of litigation. Divergent results are being reached both in the District Courts and in the Courts of Appeals. The fact that, before enactment of the statute, dismissal of the action resulted from application of the doctrine *forum non conveniens* gave rise to a proper, but great, reluctance to apply the doctrine except in situations where continued maintenance of the action in the forum where brought would amount to an abuse of process. With the advent of the procedure prescribed by section 1404(a) for transfer of the action, however, the need for so rigorous a standard disappeared; and the statute itself indicates that the preponderance of convenience should control disposition of motions made under it. Recognition that the statute effected this appropriate change has been accorded by the Courts of Appeals for the Fourth and Fifth Circuits, respectively, in *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362 (1949), cert. den. 338 U. S. 947 (1950), and in *Amalgamated Association* v. *Southern Bus Lines*, 172 F. 2d 946, 948

District Court decisions. *Nagle* v. *Pennsylvania R. Co.*, 89 F. Supp. 822 (N. D. Ohio, 1950); *Kohut* v. *Bessemer and L. E. R. Co.*, Civ. No. 27125, N. D. Ohio, April 3, 1950; *United States* v. *Scott & Williams*, 88 F. Supp. 531, 535 (S. D. N. Y., 1950); *Skultety* v. *Pennsylvania R. Co.*, Civ. 50-749, S. D. N. Y., June 1, 1950; *Cullinan* v. *New York C. R. Co.*, 83 F. Supp. 870 (S. D. N. Y., 1948).

In at least one case following the principle of the *Collett* case, the problems of original venue on the one hand, and of transfer on the basis of the convenience of the parties and witnesses on the other hand, have been properly distinguished. *United States* v. *E. I. du Pont de Nemours & Co.*, 83 F. Supp. 233 (D. C., 1949.)

(1949). In a number of cases the District Courts have taken this view.[2]

In other cases, however, the statute has been regarded as an effort merely to codify the doctrine of *forum non conveniens,* and in such cases it has been held, notwithstanding the clear provisions of the statute, that more than a fair preponderance of convenience is required to warrant tranfer.[3] Thus, the opinion of the District Court in the instant case imposes qualifications on the statutory right to transfer which were precisely the standards, limitations and language of that doctrine when the drastic remedy of dismissal was the only available relief.

We have noted above, pages 6 and 7, the tests applied by the District Court and by Judges Learned Hand and Frank in the Court of Appeals in the instant case. These are directly derived from the *forum non conveniens* cases. See *United States* v. *National City Lines,* 334 U. S. 573, 589 fn. 35 (1948); *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1947); Braucher, *The Inconvenient Federal Forum,* 60 Harv. L. Rev. 908, 930, 933. In the Court of Appeals Judge Frank explicitly held that by the enactment of section 1404(a) Congress did not alter the standard thereto-

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[2]*United States* v. *E. I. du Pont de Nemours & Co.,* 83 F. Supp. 233 (D. C., 1949); *United States* v. *Gerber,* 86 F. Supp. 175 (E. D. Pa., 1949); *Huff* v. *Nashville, C. & St. L. Ry.,* 88 F. Supp. 735 (S. D. N. Y., 1949); and see *Perry* v. *Atchison, T. & S. F. Ry. Co.,* 82 F. Supp. 912 (N. D. Cal., 1948); *United States* v. *E. I. du Pont de Nemours & Co.,* 87 F. Supp. 962 (N. D. Ill., 1950), leave to file petition for mandamus and cert. denied 339 U. S. 941, app. dismissed 339 U. S. 959 (1950).

[3]E.g., *Naughton* v. *Pennsylvania R. Co.,* 85 F. Supp. 761 (E. D. Pa., 1949); *Brown* v. *Insurograph,* 85 F. Supp. 328 (Del., 1949); *Auburn Capitol Theatre Corp.* v. *Schine Chain Theatres,* 83 F. Supp. 872 (S. D. N. Y., 1949); *Maloney* v. *New York, N. H. & H. R. Co.,* 88 F. Supp. 568 (S. D. N. Y., 1949); *Spence* v. *Norfolk & W. Ry. Co.,* 89 F. Supp. 823 (N. D. Ohio, 1950).

fore imposed in *forum non conveniens.* Several cases in the District Courts follow this understanding of the law,[4] and the incidence of application of this view has already been increased by reason of the decision in the instant case.[5]

We shall urge that this construction fails to give effect to the explicit language of the statute and we note here that the sharp conflict in the decisions presents a question of Federal law which should be resolved in order to determine and effectuate the intent of Congress and to provide authoritative standards which will remove the existing uncertainty and thereby diminish the current volume of litigation upon this subject. Federal justice is adversely affected so long as the present confusion continues and leaves at least some cases to be tried in districts other than those in which Congress has directed they should be tried.

III. The decision of the District Court in the instant case and the opinions of Judges Learned Hand and Frank upon the petition for mandamus to review it are in apparent conflict with the decisions of the Fourth and Fifth Circuits in *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.* and *Amalgamated Association* v. *Southern Bus Lines, supra,* as well as with applicable decisions of this Court.

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[4]Fn. 3 above; *Wookey* v. *Waterman S. S. Corp.,* 89 F. Supp. 909 (S. D. N. Y., 1950); and see *Tivoli Realty* v. *Paramount Pictures,* 89 F. Supp. 278 (Del., 1950); *Rosengren* v. *Shattuck,* Civil 9270, E. D. Pa., February 20, 1950.

[5]*Skultety* v. *Pennsylvania R. Co.,* Civ. 50-749, S. D. N. Y., June 1, 1950; *Glasfloss Corp.* v. *Owens-Corning,* Civ. 53-141, S. D. N. Y., May 5, 1950; *United States* v. *Scott & Williams,* 88 F. Supp. 531 (S. D. N. Y., 1950); *Virginia Metal Products Corp.* v. *Cowper Co.,* Civ. 54-115, S. D. N. Y., January 23, 1950; and see *Hampton Theatres* v. *Paramount Film Distributing Corp.,* 90 F. Supp. 645 (D. C., 1950); *Savoia Film, S. A. I.* v. *Vanguard Films,* Civ. 52-219, S. D. N. Y., January 27, 1950.

ARGUMENT

Summary of argument

Occasions for relief of the kind sought here will be rare, since motions for transfer involve judicial discretion and frequently depend upon the evaluation of factual issues, review of which would be foreign to the appropriate function of this Court. Where, however, decision has been controlled not by the resolution of disputed matters of fact, but by the application to indisputable facts of erroneous principles of law, error warranting review results. *Los Angeles Brush Manufacturing Corp.* v. *James,* 272 U. S. 701 (1927); *National Ben. Life Insurance Co.* v. *Shaw-Walker Co.,* 111 F. 2d 497, 507 (App. D. C., 1940, per Rutledge, J.), cert. den. 311 U. S. 673; *Porta* v. *Watts,* 109 F. 2d 966 (C. C. A. 10, 1940).

It is fundamental error, in view of the provisions of 28 U. S. C. § 1404(a) authorizing transfer of actions for the convenience of parties and witnesses, in the interest of justice, to consider the plaintiff's initial choice of venue as in itself an obstacle to a transfer of the action, otherwise appropriate, or to apply in determining motions for transfer the standards which formerly controlled dismissal of cases on the grounds of *forum non conveniens.*

I. In decisions contrary to those of this Court and of the Courts of Appeals for the Fourth and Fifth Circuits, the Courts below misconceived the purpose and effect of section 1404(a).

A. The venue privilege afforded by the Clayton Act should not prevail against the fair preponderance of the criteria designated in section 1404(a).

In the instant case no fact which properly might affect decision of the questions presented is in dispute. In a

careful opinion the District Court set forth explicitly the considerations which led him to refuse transfer of the action. In a final paragraph he epitomized the legal conclusion which, we respectfully submit, constitutes error requiring correction by this Court (R. p. 29):

> "I conclude on the basis of all the considerations which have been brought to my attention, those which I have discussed as well as those many others urged upon me, too numerous and complex for adequate discussion within the length reasonable for a judicial opinion, that although defendants have persuaded me that there may be a balance of convenience in their favor as the facts have been presented, that balance lacks sufficient preponderance to convince me that I would be justified in disturbing plaintiffs' choice of forum. In other words, plaintiffs have demonstrated sufficient reason for retaining jurisdiction in this forum. Defendants' motions must be denied."

In this reasoning, the District Court was sustained by the Court of Appeals, and particularly by Chief Judge Hand, who would have held it an abuse of discretion to refuse transfer but for the privilege to choose venue which he felt was afforded the plaintiffs by statute. Such an approach, which considers the initial choice of venue by the plaintiff as a positive factor, inhibiting transfer of actions, is at war with and renders meaningless the terms of the statute which would consider instead the convenience to plaintiff, if any, which will be served by retention of the action in the forum where it was commenced. The distinction is of prime importance in this case where the forum chosen is not only inconvenient for the moving defendants but foreign to the plaintiffs who selected it.

This patent error—into which both the District Court and the Court of Appeals fell—of regarding the venue privilege of the plaintiff as in itself an obstacle to transfer of the action, was repudiated by this Court, per Chief Justice Vinson in *Ex parte Collett,* 337 U. S. 55, 60 (1949), where the following comment was made with respect to the plaintiff's choice of venue under the Federal Employers' Liability Act:

> "Section 6 of the Liability Act defines the proper forum; § 1404(a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404(a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously."

The same conclusion was reached in *United States* v. *National City Lines,* 337 U. S. 78 (1949) with respect to the special venue statute involved in the instant case, section 12 of the Clayton Act (15 U. S. C. § 22).

In *Eastman Kodak Company* v. *Southern Photo Materials Company,* 273 U. S. 359, 373-4 (1927) and in *United States* v. *Scophony Corp.,* 333 U. S. 795, 808 (1948), this Court had occasion to note the underlying purpose of the special venue provisions of the Clayton Act to relieve an injured plaintiff from the necessity (and sometimes the insuperable obstacle) of resort to a distant forum for redress of wrongs done closer by. The choice of venue thus afforded was absolute prior to the enactment of the transfer statute (*United States* v. *National City Lines,* 334 U. S.

573 (1948)). With the enactment of that statute, however, an action so begun is subject, as any other, to transfer for the convenience of parties and witnesses, in the interest of justice, and the plaintiff's choice of venue ceases to be an absolute criterion and retains significance only in so far as it reflects legitimate interests of the plaintiff founded in convenience or justice (*United States* v. *National City Lines,* 337 U. S. 78 (1949)). Fundamental error occurs when a choice of venue, awkward for plaintiffs as well as harassing to defendants, is allowed to prevail against a fair preponderance of the criteria established by 28 U. S. C. § 1404(a).

B. The standard of convenience to parties and witnesses, in the interest of justice, prescribed by section 1404(a) for the transfer of actions, supersedes the standards which formerly controlled dismissal of actions *forum non conveniens.*

In the instant case the District Court, with whom Judge Frank was in express accord in this respect (R. pp. 37-38), held that the enactment of the statute had not changed the criteria to be applied in determining the appropriateness of a given forum (R. p. 20). The District Court noted that by reason of the less harsh remedy of transfer he would require *less of* a showing of abuse of process, and be *more willing* to grant relief on a showing of inconvenience; but he held that transfer is appropriate only in "the exceptional case"; that "a strong balance in favor of the movant" must be shown; that the transferee forum must be not only more convenient but "highly so"; and finally that section "1404(a) only purports to correct abuses of [the venue] privilege" (R. pp. 20-22). These qualifications, which

are not to be found in the statute, are precisely those o the doctrine *forum non conveniens,* under which vexatio and abuse as well as inconvenience were prerequisite t relief. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501 (1947) *United States* v. *National City Lines,* 334 U. S. 573, 589 fn. 35 (1948); Braucher, *The Inconvenient Federal Forum* 60 Harv. L. Rev. 908, 930, 933.

While there has been confusion among the various dis trict courts in the application of section 1404(a), (*supr* pp. 9-11) two Courts of Appeals which have had occasio to compare that statute with the doctrine *forum non con veniens* have decided, in apparent contradiction to th disposition in the instant case, that transfer under th statute may be ordered for the convenience of parties an witnesses in the interest of justice, regardless whether th more drastic remedy of dismissal would have been appro priate under the *forum* doctrine. In *Jiffy Lubricator Co* v. *Stewart-Warner Corp.,* 177 F. 2d 360, 362 (C. A. 4 1949), cert. den. 338 U. S. 947 (1950), the Court said:

> "* * * The notion that 28 U. S. C. A. § 1404(a) wa a mere codification of existing law relating to forum non conveniens is erroneous. It is perfectly clea that the purpose of this section of the Revised Jud cial Code was to grant broadly the power of transfe for the convenience of parties and witnesses, in th interest of justice, whether dismissal under the doc trine of forum non conveniens would have been ap propriate or not. See Ex parte Collett, 337 U. S 55; Kilpatrick v. T. & P. R. R. Co., 337 U. S. 75 U. S. v. National City Lines, 337 U. S. 78; an Amalgamated Association, etc. v. Southern Bu Lines, 5 Cir. 172 F. (2d) 946, 948.***"

In *Amalgamated Association* v. *Southern Bus Lines*, 172 F. 2d 946, 948, the Court of Appeals for the Fifth Circuit, similarly distinguishing the *forum* doctrine, said:

> "* * * Dismissal for inconvenience is not to be visited except when the choice of forum is a real hardship, or an imposition on the court. But here again we meet the Revision of Title 28, for Section 1404 providing for a change of venue is: '(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' * * * Transfer is a less drastic matter than dismissal, for it involves no loss of time or pleading or costs; and no doubt a broader discretion may be exercised in ordering it. * * *"

Nothing could be more apparent than that section 1404(a), though drafted in accordance with the doctrine of *forum non conveniens*, is no mere codification in the usual sense of statutory restatement of existing case law. The statute applies to antitrust cases and to other categories of action which the doctrine did not reach. The statute grants authority to transfer the action, whereas under the doctrine a court could only dismiss. The statutory language omits limitations inherent in the *forum* doctrine, including the requirement that, in addition to inconvenience, there be vexation, harassment, or abuse of venue privilege in order to warrant relief. Compare *United States* v. *National City Lines*, 334 U. S. at p. 589, fn. 35 (1948).

The omission from the statute of the abuse test which had prevailed under the *forum* doctrine was not inadvertent. Professor James Wm. Moore, a Special Consultant in con-

nection with the revision of the Judicial Code, made the following statement at the hearings on the bill:

> "Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518."

(Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., 1947, March 7, 1947, p. 29). This unequivocal statement of purpose, taken together with the unqualified language of the statute, should make clear the error of the Courts below in affording a residual vitality to the rigorous standards of the *forum* doctrine.

II. Upon the undisputed facts presented, denial of the motions for transfer resulting from application of the standards demonstrated to be erroneous in Point I, above, constituted an abuse of discretion.

A. This case precisely parallels the National City Lines case.

The simplest statement of the issues in the instant case demonstrates its nexus with the Michigan forum rather than with the forum in which the plaintiffs chose to sue. We

would respectfully refer the Court at this point to the Statement of the matter involved, *supra,* pp. 4-6. The facts there noted bring this case squarely within the holding in *United States* v. *National City Lines,* 80 F. Supp. 734 (S. D. Cal., 1948), motion for leave to file petition for certiorari denied 337 U. S. 78 (1949).

The complaint in the *National City Lines* case charged a nationwide conspiracy to monopolize commerce in motor buses and accessories manifesting itself in the acquisition of local transportation companies in 42 cities in 16 states. Although some of the defendants were incorporated in California and at least one of these did business or was found in the Southern District of California (Transcript of Record, pp. 11, 113, 151, 334 U. S. 573 (1948)), the center and focal point of the alleged conspiracy was the area in which the chief defendants, National City Lines and American City Lines, had their principal places of business (Illinois), rather than the forum (Southern District of California) chosen by the plaintiff. The charge of conspiracy was based upon agreements reached principally in Illinois between the chief defendants and others.

The Government, opposing a previous motion for dismissal based on *forum non conveniens,* averred, as the plaintiffs opposing the transfer motions here have averred, that the allegations of the complaint would be supported by proof located in the California forum. Indeed, the position taken by the Government in that case was far stronger than that taken by the plaintiffs here, the Government going so far as to state (affidavit of Jesse R. O'Malley, in opposition to the motion) that: "the evidence which the Government expects to introduce * * * covers and relates to the activities of the defendants * * * in the West Coast area

including the State of California in particular." (Transcript of Record, p. 112, 334 U. S. 573 (1948)). The Government appears, in fact, to have built its case almost entirely upon evidence of the defendants' actions in California (id. pp. 113-115).

In granting this prior motion under the *forum* doctrine, the District Court (Judge Yankwich) referred in his opinion (7 F. R. D. 456, 465) to his analysis of the facts in the companion criminal prosecution in which he stated (7 F. R. D. 393, 401-2):

> "Acts and contemporaneous declarations of defendants, unrevealed by the Government's documentation, may change entirely the complexion of the case. And the Government is not in a position to say that it has in its possession and can produce through witnesses and documentary evidence *locally available* all the facts bearing on the intent of the defendants. So that even if we assume that the Government does not need and will not produce outside witnesses or documents located outside of California, this *does not contradict* the sworn statements of the officers of the defendant companies that their defense will be grounded on the testimony of witnesses who will have to be taken away from their head offices and on documentary evidence and company records which will have to be transported to this district. *Firestone alone estimates that sixteen of its officers, executives or members of its managerial staff, residents of Akron and Chicago, may be needed as witnesses in the case.*
>
> "The Government's affidavit lays much stress on the fact that the local operating subsidiary enjoys a measure of local control and that the largest restraint in the free flow of products resulted from the acquisition of the local transportation system. The emphasis placed on the size of the Los Angeles trans-

> action in the Government's affidavit and at the oral argument *does not* conform to the pattern of the indictment." (Italics by the Court.)

The facts warranting transfer are more compelling in the instant case than in *United States* v. *National City Lines.* Here, two of three corporate defendants served have their principal places of business in Detroit, while in that case only two of nine corporate defendants had their principal places of business in Illinois. In addition, the four individual defendants served in the instant case, as well as those named but not served, live in Detroit. These are the principal defendants.

In deciding which was the appropriate forum, primary weight was given in the *National City Lines* case to the convenience of the so-called "chief defendants". The "chief defendants" in the instant case are all located in Detroit. The corporate plaintiff here has its principal place of business in Detroit, whereas in the *National City Lines* case the Government, of course, had no particular business location. It is not, furthermore, even contended that New York is the area in which the greatest amount of allegedly unlawful activities took place, as the Government asserted of California in the *National City Lines* case.

The principle of that case, which, with the approval of this Court, finally resulted in transfer to the Northern District of Illinois, Eastern Division, under section 1404(a), is that an action charging a nationwide conspiracy should be tried in the locality wherein it is centered and where the principal sources of proof as to the defendant's activities are to be found, rather than in one of many far distant areas in which some aspects of the conspiracy were allegedly manifested. The principle applies *a fortiori* here, where

the activities of plaintiffs, as well as of defendants, and the sources of proof as to them are also in Detroit.

B. The facts before the Courts below constituted clear proof of the superior convenience of the forum to which transfer was requested.

The more convenient forum as well as the interest of justice in a case of this complexity must be determined with reference to the location of the sources from which proof will come. The primary sources on both sides must be the voluminous files in Detroit of the competing business organizations which are the principal protagonists, the testimony of their present and former officers and employees who are inhabitants of the Eastern District of Michigan (Ex. C, pp. 3-6, 8-12, 19-74, 182-187, 351-384; R. p. 27) and, if possible, examination of the premises in Detroit where the competing machines have been and are built, and of succeeding models of such machines which are kept there (Ex. C, pp. 267-272, 351-352; R. p. 27).

(1) THE CONVENIENCE OF PARTIES

This case involves most complex issues of fact and law. Treble damages aggregating $251,640,000 are claimed. The proof will cover the history of the tractor business of the Ford company during a period of more than three decades, and the entire business life of the Ferguson company. Preparation for trial, with almost continuous depositions, has already consumed more than two years and is yet incomplete. The defendants' efforts to remove the case from the present inconvenient forum have continued almost as long, but have in no way operated to delay the progress of the case. The trial itself will inevitably take some months (Ex. C, pp. 179-180).

The inconvenience to the Ford Motor Company, Dearborn Motors Corporation, and to the individual defendants of proceedings in the Southern District of New York is attested by the several affidavits in support of the motions for transfer, and is indeed self-evident. All of the individual defendants, including the President and Executive Vice President of Ford Motor Company, as well as other principal officers and employees of the Ford and Dearborn companies, will be required not only to testify further by deposition and at the trial of the action, but also, in their own and their corporations' interests, must attend substantial portions of the trial and consult frequently and extensively with counsel in the preparation of the defense and conduct of the litigation. Their protracted absence from Detroit has resulted and will continue to result in increasing measure in unnecessary loss to the defendant companies of the services of their most important executives, and in personal inconvenience to those persons, as well as great difficulty in the preparation of the defense and in the continued performance of other obligations which they have undertaken (Ex. C, pp. 11-13, 19-44, 47-68).

On this question of the convenience of the parties, the affidavits submitted on behalf of the plaintiffs in opposition to the motions really state no more than that the officials of the Ferguson company, although their homes and offices are in Detroit, find the New York and Michigan fora equally inconvenient (Ex. C, pp. 130-150). It is an apparent fact that continued prosecution of the action at a place remote from their offices will prevent the parties, whether plaintiffs or defendants, in attendance at the proceedings from giving any but cursory attention by telephone to business matters during the hours before and after sessions and during brief

adjournments thereof; whereas in Detroit such time would present real opportunities to act effectively in the prosecution of business affairs (Ex. C, pp. 174-180, 217-218). The burden on the Ferguson company's officers of giving depositions in New York was, prior to the making of the defendants' motions for transfer, the subject of complaint by plaintiffs' counsel (Ex. C, pp. 11-13, 183).

The superior convenience to defendants of the Michigan forum cannot be seriously disputed. And plaintiffs make no effort to state any facts establishing the superior convenience to themselves of the New York forum. In this regard they failed entirely in the light of the standard of convenience to the parties prescribed by the statute, to present adequate reason for retaining the action in this forum. *Cf. Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 509-10 (1947).

(2) The convenience of witnesses

Individual parties and employees of corporate parties are entitled to consideration under the statute as witnesses in the same way as are strangers to the cause. Of the great number of such persons included in the list of prospective witnesses submitted by the defendants at the request of the District Court, all except the plaintiff Harry Ferguson are residents of the Eastern District of Michigan (Ex. C, pp. 307-343, 346-347). Mr. Ferguson, a resident of England, on his occasional visits to this country has sojourned in Detroit where his business interests are (Ex. C, pp. 55-56).

Witnesses other than individual parties and officers and employees of corporate parties are concerned only with particular aspects in which the alleged conspiracy is claimed to have been manifested. Their testimony will be com-

paratively brief and their absence from accustomed occupations a correspondingly lesser burden than in the case of the parties whose examination will cover the entire reach of the action and on whom counsel are dependent constantly for guidance (Ex. C, pp. 373-384).

The witnesses who must necessarily be called are mainly to be found in the Eastern District of Michigan (Ex. C, pp. 307-334). Confirmation of this fact is to be found in the notices which were originally served for the taking of depositions. The record before the District Court disclosed that defendants had noticed for examination eight executives or employees of the Ferguson company, seven of them residing in the Eastern District of Michigan, and one, Mr. Ferguson, residing in England. Plaintiffs noticed 24 persons for examination, 16 of whom reside in the Eastern District of Michigan. Of the remaining eight, three reside in the British Isles, one is deceased, one resides in Chicago, and two in New York; the residence of the eighth, a New Yorker who contemplated leaving there does not appear in the record, but is in fact in Montana (Ex. C, pp. 9-10, 73).

The record contains no evidence concerning the convenience of such witnesses as are not associated with the parties, but it is fair to assume that the forum nearest the homes of the greater number of them will best serve their interests. The plaintiffs' showing in this regard is limited to their list of prospective witnesses (submitted in connection with the motion for transfer), most of whom are said to be in or near the current forum. A great majority of those named are securities underwriters and tractor distributors and dealers (Ex. C, pp. 335-343). So far as we are aware, only an insignificant number of those designated

were interviewed by counsel for the plaintiffs (Ex. C, pp. 385-386, 394-395). These persons were selected from an aggregation of persons similarly situated and resident in the Eastern District of Michigan and elsewhere throughout the United States. Detailed analysis of this listing of prospective witnesses by the plaintiff is unnecessary in view of the District Court's holding that it was merely cumulative (R. p. 31).

(3) CONVENIENCE WITH RESPECT TO CERTAIN MATTERS AS TO WHICH SOME PROOF IS TO BE FOUND ELSEWHERE THAN IN DETROIT

The District Court declined to base his decision upon an evaluation of the relative convenience of the Detroit and New York fora, on the ground that to do so would require a balancing of considerations which he found too difficult to undertake (R. pp. 25-26). Judge Frank (R. pp. 39-40) was of the same opinion. In this view, the fact that some evidence may be had in New York, was sufficient reason for denial of the motions (R. pp. 24-25). The fundamental error in the Courts below with respect to these matters was that they were held sufficient reason in themselves for neglect to make the more extensive evaluation of convenience to parties and witnesses which the statute in terms requires. With great respect, we submit that the fact that some evidence may exist outside the Eastern District of Michigan is quite insufficient in sound discretion to meet the standard prescribed by the statute or to impair the showing of preponderant convenience to parties and witnesses established by all of the facts on which the motions were heard; and that to decline to make the evaluation constitutes abnegation of the duty imposed on the Court by statute.

CONCLUSION

Present in Detroit are the three principal corporate parties, the Ford, Dearborn and Ferguson companies, and their officers and critical employees (including all of the individual defendants) who together represent the primary and certain source of proof on all of the many issues in the action. This is to say nothing of the location in Detroit of the voluminous records to be made a part of the proof, and the fact that the multiple transactions and activities alleged, if they occurred at all, either occurred in Detroit or were directed from there (pp. 4-6, *supra*).

Not to find in this showing such a preponderance in favor of the Michigan forum as to require transfer of the action amounts to disregard of established facts sufficient to constitute an abuse of discretion. *Cohen* v. *Young,* 127 F. 2d 721, 725-726 (C. C. A. 6, 1942); *In re A. Roth Co.,* 125 F. 2d 396, 398 (C. C. A. 7, 1942). Had the action originally been brought in the Michigan forum and an attempt made to transfer it to New York, it is clear that such considerations as are here urged by the plaintiffs in favor of New York would appear frivolous.

The Courts below, believing that the limitations inherent in the *forum* doctrine were part of section 1404(a), held that to warrant transfer of the action pursuant to the statute, a showing of abuse of the venue privilege on the part of the plaintiffs is required. Misconceiving the obligation imposed by the statute to determine the relative convenience of alternative *fora,* and in the process failing to evaluate important considerations of convenience favoring the Michigan forum, decision was allowed to rest on the inadequate foundation that at least some of the evidence as

to some of the issues is to be found in New York. Where such a misapprehension of the principles which control decision prevails, discretion, if it may be said to have been exercised at all, is not sound but abused. *Los Angeles Brush Manufacturing Corp.* v. *James*, 272 U. S. 701 (1927).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit, and that a hearing upon and determination by this Court of the matters presented be had.

Dated, August 11, 1950.

Respectfully submitted,

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FILED
SEP 30 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 246.

FORD MOTOR COMPANY, HENRY FORD II, ERNEST R. BREECH, JOHN R. DAVIS, DEARBORN MOTORS CORPORATION, ERNEST C. KANZLER and SHERMAN TRACTOR & EQUIPMENT CO., INCORPORATED,

Petitioners,

v.

The Honorable SYLVESTER J. RYAN, United States District Judge and HARRY FERGUSON and HARRY FERGUSON, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Statement of Facts	2
The petition	2
The complaint	4
Important events and occurrences in New York	6
The "interest of justice"	6
The earlier motions	9
The present motions	9
The proceedings in the Court of Appeals	9
Statutes Involved	10
Argument	11
Summary of Argument	11
I. The petition should be summarily dismissed, as the order of the District Court was interlocutory and non-appealable	11
II. The decisions below involved the consideration of the particular facts in this case and do not raise any general question of law as to the standard to be applied under Section 1404(a)	15
Judge Ryan held that Section 1404(a) required less of a showing than the older doctrine	16
The "nice balance" theory	16
Plaintiff's choice of a forum in an antitrust case	18

PAGE

III. There is no conflict with any decision of this Court or with decisions of the Fourth and Fifth Circuits 19

The decisions of this Court 20

The decisions of the Fourth and Fifth Circuits 22

IV. The facts were fully considered by Judge Ryan, who held that "no balance can be struck with any degree of certainty and fairness" 23

Sherman Tractor & Equipment Company.. 24

Failure of Ferguson financing 26

New manufacturer for the tractor 28

Ford, Bacon & Davis 29

Development of the Ferguson System 29

Distributors and dealers and suppliers 30

Other New York "spear bearers" 30

"Variable, uncertain factors" 32

Petitioners' contentions 33

Conclusion 36

Table of Authorities.

PAGE

Amalgamated Association v. *Southern Bus Lines*, 172 F. 2d 946 (5th Cir. 1949) 20, 22

Cohen v. *Beneficial Loan Corporation*, 337 U. S. 541, 546-7 (1949) 11, 12

Ex parte Collett, 337 U. S. 55 (1949) 19, 20

E. I. DuPont de Nemours & Co. et al. v. *United States District Court for the Northern District of Illinois, et al.*, 339 U. S. 941 (April 24, 1950) 15, 20

Ex Parte Fahey, 332 U. S. 258 (1947) 14

Ferguson v. *Ford Motor Co.*, 77 F. Supp. 425, 432-4 (S. D. N. Y., 1948) 25, 27

Gulf Oil Corporation v. *Gilbert*, 330 U. S. 501, 516 (1947) 18, 33

Jiffy Lubricator Co. v. *Stewart-Warner Corp.*, 177 F. 2d 360 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950) 19, 22, 23

Roche v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943) .. 13

Swift & Co. v. *Compania Caribe*, 339 U. S. 684, 688-689 (1950) 11, 12

United States v. *E. I. DuPont de Nemours & Company*, 87 F. Supp. 962 (N. D. Ill., 1950) 17

United States v. *National City Lines*, 337 U. S. 78 (1949) 18, 19, 21

Statutes Involved.

Section 1404(a) 6, 7, 9, 10, 12, 15, 16, 18, 20, 21, 22

18 U. S. C. A. Section 687 21

28 U. S. C. A. Section 1291 ..... 10, 13

28 U. S. C. A. Section 1651(a) 11, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

FORD MOTOR COMPANY, HENRY FORD II, ERNEST R. BREECH, JOHN R. DAVIS, DEARBORN MOTORS CORPORATION, ERNEST C. KANZLER and SHERMAN TRACTOR & EQUIPMENT CO., INCORPORATED, Petitioners, *v.* The Honorable SYLVESTER J. RYAN, United States District Judge, and HARRY FERGUSON and HARRY FERGUSON, INC., Respondents.	No. 246.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court (R., p. 15) is reported in 89 F. Supp. 45.

The opinion of the Court of Appeals for the Second Circuit (R., p. 36) is reported in 182 F. 2d 329.

Jurisdiction.

Petitioners invoked the jurisdiction of this Court under Section 1254 of the Judicial Code (28 U. S. C. Section 1254).

Statement of Facts.

The case is pending in the United States District Court for the Southern District of New York.

Ford Motor Company, with activities extending over considerable portions of the world, asked the District Court to hold that the only place this case should be prosecuted was in its own home town, Detroit.

Failing to obtain such a holding, Ford asked the Court of Appeals to rule that the decision was so clearly erroneous as to call for the extraordinary writ of mandamus.

Again unsuccessful, Ford is now asking this Court to interfere with the District Court's exercise of discretion based on factual considerations in an interlocutory procedural matter, and to hold as a matter of law that the case should be tried in Detroit.

The petition.

The petitioners make but brief and perfunctory reference to the facts. Indeed, in the zeal of advocacy, the petition goes so far as to assert:

> "In the instant case no fact which properly might affect decision of the questions presented is in dispute" (p. 12).

It would be more accurate to say that most of the important facts were vigorously disputed. This is apparent from the printed volume marked "Exhibit C" petitioners served with their present petition. Pages 1 to 74 of that volume contain the 8 affidavits petitioners served in support of the motions for transfer. We served 9 affidavits in opposition, printed at pages 75 to 150, and numerous

exhibits which are not printed. Petitioners then served 9 reply affidavits, printed at pages 151 to 277, with numerous exhibits which are not printed. We then served 2 supplemental affidavits, printed at pages 279-306. Thereupon petitioners served a supplemental affidavit, printed at pages 345 to 392, wherein petitioners' chief counsel said:

> "As will appear, this supplemental affidavit has become necessary in order to deal with the new assertions of fact contained in the 63-page Memorandum and 11-page list of witnesses submitted by the plaintiffs since the oral argument" (p. 345 of Exhibit C).

We thereupon served a supplemental affidavit with exhibits, printed at pages 393 to 457.

On the earlier motions, in March 1948, a total of 19 affidavits were submitted to Judge Ryan and these were re-submitted in July 1949. Petitioners have not included these affidavits in the printed record submitted to this Court.

Judge Ryan had the matter under consideration for six months and handed down his 30-page decision January 6, 1950. The opinion shows on its face a thorough consideration of the facts and a careful exercise of judicial discretion, and belies the statement in the petition (p. 12) that the decision was controlled "by the application to indisputable facts of erroneous principles of law".

The following will illustrate the factual controversy. Henry Ford II made an affidavit to show why the case should be transferred to Detroit, and he said:

> "The daily operations of Ford Motor Company demand the close, constant and concentrated personal attention of all of its chief executives" (p. 20 of Exhibit C).

Yet on the return day of the petitioners' motions, Henry Ford II was absent from Detroit and, in fact, was over 4,000 miles away on a combined business trip and vacation (p. 96 of Exhibit C).

Information produced by petitioners in discovery proceedings shows that Henry Ford II during 1946 and 1947 was absent from Detroit 308 days, of which 162 days were spent in New York City and Southampton, Long Island (Ferguson-Ford II Ex. 26 for Identification). Petitioners have not produced any information as to later years.

The complaint.

This is an action for treble damages under the anti-trust and patent laws.

The individual plaintiff, Harry Ferguson, owned the patents. He devoted nineteen years of experimental work in Ireland to the development of a new type of tractor and line of farm implements.

The corporate plaintiff, Harry Ferguson, Inc., established and carried on the business in this country.

Ferguson arranged with Henry Ford in 1938 to produce the new type of tractor. The Ferguson Company got other manufacturing companies to supply the various implements to go with the tractor.

The Ferguson Company built up and trained a nationwide organization of 33 distributors and about 3,000 dealers to sell and service the tractors and implements.

In November, 1946, Ford "broke" with the Ferguson Company. The complaint alleges that the "break" was a step in carrying out a conspiracy to seize the Ferguson Company's profitable business in all its aspects, that is—

To copy and sell the Ferguson tractor and farm implements and thus pirate Ferguson's inventions and developments;

To take over the distributor-dealer organization built up by Ferguson and to force the distributors and dealers to sell the Ford-Dearborn tractors and implements exclusively and to cancel orders and refuse to sell Ferguson tractors and implements;

To induce Ferguson suppliers to sell implements only through Dearborn and thus cut off Ferguson's sources of supply;

To induce Ferguson engineers and other employees to go with Ford and Dearborn and turn over confidential information; and

To impede Ferguson's efforts to obtain public financing and to get a new manufacturer for the tractor and to re-establish its business.

The conspiracy was successful. The petitioners took over 26 of the 33 Ferguson distributors and virtually all of the 3,000 dealers which Ferguson had trained. The petitioners also induced a number of Ferguson suppliers to break off with Ferguson and to supply virtually the same implements to the petitioners.

Petitioners organized Dearborn Motors Corporation as the instrumentality to take over the Ferguson Company's profitable business. The common stock of Dearborn was allotted to Ford executives and their families and represented a total investment of only $200,000.

Dearborn's net profits from the business during the first three years, 1947 through 1949, amounted to about $20,000,000, or one hundred times the total common stock investment. Out of those profits, $2,000,000 was distributed as cash dividends to Dearborn stockholders and about $18,000,000 was reflected in the book value of the stock at the end of 1949. (Pages 63-67, 293-296 of Pierce deposition.)

Important events and occurrences in New York.

Even on the narrow question of "convenience", petitioners have failed to establish any balance in favor of Detroit.

One of the corporate defendants, Sherman Tractor & Equipment Co. Incorporated, is located in New York. Its president, Eber Sherman, had been associated with Ferguson as early as 1925 and became the first president of the corporate plaintiff, originally named Ferguson-Sherman Manufacturing Corporation. Thus Sherman, of all the conspirators, had intimate knowledge of the Ferguson business and had a significant part in the steps to carry out the conspiracy.

New York City, the recognized investment market of the world, was naturally the center of efforts on the part of F. Eberstadt & Co. to obtain capital for the Ferguson Company after the Ford "break". When the financing had to be called off, the all-important conference took place at the Eberstadt office here.

Mr. Eberstadt also had a large part in the efforts to obtain a new manufacturer for the Ferguson tractor.

Ford, Bacon & Davis, Commercial Investment Trust, J. Walter Thompson and several other New York firms are involved as sources of proof on particular aspects of the case in the litigation. These and other facts bearing on the question of convenience will be stated below under Point IV.

The "interest of justice".

Section 1404(a) involves something more than just a question of "convenience". The court is empowered to transfer an action only where it is "in the interest of justice." Yet on the matter of the "interest of justice", the petition is most notably silent.

Petitioners do not suggest, nor can they suggest, any doubt as to a fair and just determination here in the Southern District of New York. Ford is not a stranger to litigation in the Federal Courts in this area (p. 96 of Ex. C).

Nor do petitioners suggest that plaintiffs have gained any advantage or petitioners suffered any disadvantage through the choice of the New York forum. On the other hand, transfer of the case to Detroit would be most seriously to the disadvantage of plaintiffs—for it would delay the trial and would involve difficulties in the selection of an unbiased jury.

The conspiracy charged in the complaint is a continuing one, is still in operation, and is backed by the tremendous financial resources of the defendants.

At this time in this particular case, to delay justice is to deny justice. It is not a question as to what the Court ought to do in a new case just filed. This complaint was filed almost three years ago, several months before Section 1404(a) was enacted.

The case has been most actively litigated here at all times, and Hon. Robert McC. Marsh as Special Master has been sitting continuously for two years in New York City. Here in New York about ten lawyers have been devoting all of their time to this case on behalf of the plaintiffs and a much larger number have been working on the case for the petitioners.

The case has moved up on the Jury Calendar, and the Calendar Commissioner of the Southern District of New York estimates that it may be reached for trial in October or November, 1950. An early trial is vitally important to the plaintiffs.

If this case is transferred to Detroit,

> "* * * the time when the same might be reached for trial is highly uncertain" (p. 125 of Ex. C).

Extracts from the rules of the Eastern District of Michigan are printed at pages 127-9 of Exhibit C.

Judge Ryan discussed the "interest of justice" and among other things he stated:

> "New York is the site of events and occurrences which gave rise to the charge. Accordingly, jury service by New York citizens is not an imposition nor is it one on this court no matter what the state of its calendar" (p. 476 of Ex. C).

Our affidavits on the earlier motions showed the possible difficulties involved in selecting an impartial jury in Detroit. Ford Motor Company itself employs upwards of 100,000 persons in Wayne County and companies located there who supply their principal product to Ford Motor Company employ something like another 170,000 (pp. 22-23 of Alexander affidavit in opposition to earlier motions to dismiss). These employees have families and other dependents.

Thus a large part of the population of Wayne County have a direct personal interest in the operations of Ford Motor Company.

In contrast, the Ferguson Company now has about 560 employees.

It is possible that Ford Motor Company may have made enemies and that some Detroit jurors might be biased against Ford Motor Company. Ford's competitors in the passenger car and truck business likewise are located in the Detroit area.

Biased jurors, whether for or against Ford, or both, may cause a mistrial or disagreement, which would be to the sole advantage of petitioners.

Apprehension as to a jury's bias is sufficient to lead to a change of venue, even where it deprives the plaintiff of his choice of venue.

In the present case the situation is reversed. It is only by disturbing the plaintiffs' choice of forum that any question as to a fair trial arises.

The earlier motions.

The complaint was filed January 8, 1948.

In March 1948 petitioners made their first attempt to transfer the case to Detroit under the doctrine of *forum non conveniens*. Judge Ryan held that he had no power to apply that doctrine to an antitrust case, and in any event that the "factual merits" required a decision denying the motions. His decision was handed down April 21, 1948 and is reported in 77 F. Supp. 425.

Petitioners made no attempt to review that decision.

The present motions.

Section 1404(a) was enacted June 25, 1948, effective September 1, 1948.

After waiting a year, petitioners on June 24, 1949, made their present motions. The motions were argued before Judge Ryan on July 26, 1949.

Judge Ryan handed down his decision on January 6, 1950 denying the motions (89 F. Supp. 45).

The proceedings in the Court of Appeals.

Petitioners served a notice of appeal to the Court of Appeals, and at the same time made application for leave to file a petition for a writ of mandamus.

We urged that the petition was inadequate on its face and asked that the Court of Appeals summarily strike the petition from its calendar (R., pp. 7-12). Also we asked the Court of Appeals to dismiss the appeal summarily on

the ground that Judge Ryan's decision was interlocutory and not appealable (R., pp. 42-44). Our motions were returnable on February 27, 1950.

Instead the Court of Appeals went into the merits, heard argument and received printed briefs. The decision of the Court of Appeals was handed down on May 8, 1950 dismissing the appeal and denying the petition for writ of mandamus.

STATUTES INVOLVED.

The motions were under 28 U. S. C. Section 1404(a):

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The venue provision is in Section 12 of the Clayton Act, 15 U. S. C. Section 22:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Appeals from decisions of district courts are under 28 U. S. C. Section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The application to the Court of Appeals for mandamus was under 28 U. S. C. Section 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

ARGUMENT.

Summary of Argument.

Point I will cite decisions of this Court relating to appellate review of interlocutory orders.

Point II will analyze the decisions below and show that this case does not raise any question of law as to the standard to be applied under Section 1404(a).

Point III will show that the decisions below could not be in conflict with decisions of this Court and other circuits.

Point IV will review the facts and show that even on the narrow question of convenience the petitioners have failed to establish a balance in favor of Detroit.

I.

THE PETITION SHOULD BE SUMMARILY DISMISSED, AS THE ORDER OF THE DISTRICT COURT WAS INTERLOCUTORY AND NON-APPEALABLE.

Petitioners, at page 7, mention the decision of the Court of Appeals dismissing their appeal. They present no argument as to whether the order was appealable but just cite *Cohen* v. *Beneficial Loan Corporation*, 337 U. S. 541, 546-7 (1949), and *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 688-689 (1950).

The Court of Appeals said that the *Cohen* case "is not in point" (R., pp. 36-37).

The *Cohen* case was a stockholder's derivative action brought in the District Court in New Jersey on the basis of diversity of citizenship. A New Jersey statute provided that the plaintiff in that type of action could be required to post security for reasonable expenses incurred by the corporation. The District Court held that the state statute was not applicable to an action pending in the Federal Court. An appeal was taken to the Court of Appeals, which reversed. On certiorari the Supreme Court affirmed.

With respect to the question of appealability the Court said:

> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question" (pp. 546-547).*

The present situation is thus expressly distinguished in the *Cohen* case. Judge Ryan found he had the power to transfer the case under Section 1404(a), and he reviewed the factual considerations and exercised his discretion in denying the motions.

The petition, at page 7, also cites without discussion *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 688-689 (1950). That case involved an order of the District Court

* Emphasis supplied throughout.

vacating the attachment of a vessel in an admiralty proceeding, and bears no resemblance to the present case.

We come now to the question of the circumstances under which mandamus is available where appeal is contrary to the statutes. On this point the petition is devoid of any citation of authority. Mandamus cannot be a substitute for appeal but only lies in extraordinary cases of abuse or usurpation of judicial power.

Swan, Circuit Judge, in concurring, placed his denial of the petition on the ground that the Court of Appeals lacked power to grant it, and he continued:

> "As said by Mr. Justice Roberts in *DeBeers Mines* v. *United States,* 325 U. S. 212, at 217: 'When Congress withholds interlocutory reviews, §262 [of the Judicial Code, now incorporated in 28 U. S. C. A. §1651 (a)] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power.' See also *Ward Baking Co.* v. *Holtzoff,* 2 Cir. 164 F. 2d 34, 36" (R. p. 41).

Congress has provided for appellate review of "final decisions" only (28 U. S. C. Section 1291).

As to most interlocutory decisions, the losing party can show good reason why he would be better off if he could have an interlocutory appellate review. It is hard to imagine a better reason than that urged in *Roche* v. *Evaporated Milk Ass'n,* 319 U. S. 21 (1943). That was an antitrust indictment. Pleas in abatement were filed. The Government motions to strike the pleas were granted. The Court of Appeals ordered a writ of mandamus to issue directing the District Court to reinstate the pleas in abatement.

This Court reversed. Chief Justice Stone, writing for a unanimous Court, said:

> "Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate

> determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable" (p. 30).

This Court further said:

> "In the present case the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court" (p. 32).

In *Ex Parte Fahey,* 332 U. S. 258 (1947), this Court denied an application for mandamus. The purpose of the writ was to reverse an allowance of counsel fees by the District Court. Mr. Justice Jackson, writing for the Court, said:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes" (pp. 259-260).

E. I. DuPont De Nemours & Co. et al. v. *United States District Court for the Northern District of Illinois, et al.*, 339 U. S. 941 (April 24, 1950), involved a decision refusing to transfer an antitrust action under Section 1404(a). This Court denied without opinion the motion for leave to file petition for mandamus and/or certiorari. In that case, the jurisdiction of this Court was invoked under 28 U. S. C. Section 1651(a), the same Section under which petitioners invoked the jurisdiction of the Court of Appeals in the instant case.

Section 1404(a) gives the District Court the power in its discretion to transfer a civil action. Judge Ryan exercised the discretion granted, and we do not understand that the petitioners charge him with actual abuse or usurpation of judicial power. Nor did the Court of Appeals by refusing to issue mandamus exceed the discretion vested in that Court by 28 U. S. C. Section 1651(a).

Clearly this is not a case calling for the extraordinary writ of mandamus which in itself is discretionary.

II.

THE DECISIONS BELOW INVOLVE THE CONSIDERATION OF THE PARTICULAR FACTS IN THIS CASE AND DO NOT RAISE ANY GENERAL QUESTION OF LAW AS TO THE STANDARD TO BE APPLIED UNDER SECTION 1404(a).

Petitioners assert that Judge Ryan "held that the enactment of the statute had not changed the criteria to be applied" (p. 15 of the petition).

On the contrary, Judge Ryan agreed with petitioners that less of a showing is now required to justify transfer under Section 1404(a).

If Judge Ryan in fact misinterpreted the law, he erred only in not requiring the petitioners to meet the heavier burden of proof imposed under the doctrine of *forum non conveniens.*

Judge Ryan held that Section 1404(a) required less of a showing than the older doctrine.

We urged before Judge Ryan that the same standard he applied in his earlier decision was still applicable, and that he should summarily deny the present motions.

Judge Ryan rejected our contention. He said that the remedy under Section 1404(a):

> "* * * is less harsh than the remedy available under *forum non conveniens*—i. e. dismissal * * *" (p. 466 of Ex. C).

and that the court will

> "* * * require less of a showing of 'abuse of process' while being more willing to grant relief on a showing of inconvenience" (p. 466 of Ex. C).

He therefore held:

> "I must reexamine and reappraise those facts in the light of the remedy afforded by 1404(a)" (p. 466 of Ex. C).

The "nice balance" theory.

The petitioners, however, could not even sustain this lighter burden of proof. They contended that, in order to apply Section 1404(a), district courts must determine a "nice" balance of convenience and must order transfer whenever some slight balance of convenience is discernible.

Judge Ryan was not willing to go that far. He said:

> "Such a theory would create administrative difficulties entirely unjustified by any beneficial re-

> sult, require a court to reach a conclusion which could not be reached with any degree of assurance and deprive a plaintiff of any certainty in its selection of venue. Since a defendant might often show that although one forum was not highly inconvenient, another was slightly more desirable, the venue provisions would become little more than provisions regulating the place of service of summons, and Section 1404(a) would substitute for a litigant's judgment and option as to place of suit, that of the court. Such a change was not contemplated by Congress when it enacted this section. See, Senate Report No. 1559, 80th Cong. 2d Sess. (1948); *Ex parte Collett, supra,* at page 62 and authorities there cited. A strong balance in favour of the movant must still be shown, although as above indicated, that balance is less than that required under forum non conveniens" (p. 467 of Ex. C).

Judge Ryan said:

> "I conclude that 1404(a) does not authorize this court to grant relief on the meticulous balancing of variable, uncertain factors which would be necessary" (p. 473 of Ex. C).

To substitute the "nice balance" theory urged by petitioners would disrupt the orderly administration of justice in the federal courts. In the District Court's decision in *United States* v. *E. I. DuPont de Nemours & Company,* 87 F. Supp. 962 (N. D. Ill., 1950) the Court said:

> "To attempt to resolve the niceties involved in balancing the relevant conveniences and inconveniences of all of the parties to any degree of certainty, resort must be had to an apothecary's scale and a crystal ball, neither of which implements are available to this court" (p. 965).

Plaintiff's choice of a forum in an antitrust case.

Here, in a suit against a billion dollar corporation doing business in various parts of the world, petitioners are contending that, as a matter of law, the trial must be in their own home town.

Judge Ryan recognized that contention as an attempt by the petitoners to choose the forum. He said:

> "Fourthly, weight must be given, in balancing the criteria listed, to the venue privilege afforded plaintiffs by the antitrust laws. An extended discussion of that privilege seems unnecessary, it sufficing to say that 1404(a) only purports to correct abuses of that privilege. It does not undermine the policies which motivated Congress to grant the privilege, nor does it deprive plaintiffs of an opportunity to prove their case in a place where proof is available" (p. 468 of Ex. C).

In applying the doctrine of *forum non conveniens,* in *Gulf Oil Corporation* v. *Gilbert,* 330 U. S. 501 (1947), Mr. Justice Jackson, writing for the Court, said:

> "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (p. 508).

Since that decision, this Court has decided *United States* v. *National City Lines,* 337 U. S. 78 (1949), where the Department of Justice contended most strongly that Congress never intended Section 1404(a) to have any application to antitrust cases. This Court rejected that contention; but there is no reason or authority to support the proposition that Congress intended to nullify completely the right given the plaintiff under the antitrust laws to choose the venue.

The petition accuses the Court of Appeals as well as the District Court of "regarding the venue privilege as itself an obstacle to transfer of the action" (p. 14 of the petition). This assertion is not well founded.

Judge Ryan's opinion shows throughout that he weighed many other considerations along with the venue privilege.

Frank, Circuit Judge, said that the venue privilege was "a factor to be considered" (R. p. 38). L. Hand, Circuit Judge, said that the venue privilege "must be overcome by more than a bare balance of convenience between the two forums", and that the privilege "still counts in the scale" (R. p. 41). Swan, Circuit Judge, in his concurring opinion made no reference to the venue privilege.

Thus the decision of both courts was that the venue privilege is one of the factors to be weighed, and that petitioners have not made a good enough showing to overcome the venue privilege. The weight to be given to the plaintiff's choice of a forum should depend on the facts in the particular case; and above at pages 7-8 we show that in the present case it should count heavily against the motions to transfer the action to Detroit.

III.

THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT OR WITH DECISIONS OF THE FOURTH AND FIFTH CIRCUITS.

The gist of the petition in the instant case is that Judge Ryan's decision is in conflict with

> the standard applied by this Court in *Ex Parte Collett*, 337 U. S. 55 (1949) and *United States* v. *National City Lines*, 337 U. S. 78 (1949) and
>
> the standard applied by the Fourth and Fifth Circuits in *Jiffy Lubricator Co.* v. *Stewart-Warner*

Corp., 177 F. 2d 360 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950), and *Amalgamated Association* v. *Southern Bus Lines*, 172 F. 2d 946 (5th Cir. 1949).

The short answer is that those decisions did not define or apply any standard under Section 1404(a) and there could not be any conflict.

The decisions of this Court.

Turning first to the decisions of this Court, we do not find any conflict. On the contrary, just two weeks prior to the decision of the Court of Appeals in the present case, this Court handed down a decision on all fours with and controlling the decision of the Court of Appeals here. We refer to the decision in *E. I. DuPont de Nemours & Co., et al.*, v. *United States District Court for the Northern District of Illinois, et al.*, 339 U. S. 941, (April 24, 1950). There this Court denied without opinion a petition for leave to file petition for mandamus and/or certiorari.

In our instant case, on any view of the facts, there are much stronger grounds for denying the motions than there were in the *DuPont* case. It does not appear whether the *DuPont* decision was based on the procedural question as to the availability of the extraordinary writ, or whether it was based on the substantive legal question as to the standard to be applied under Section 1404(a); but in either case it requires the denial of the present petition.

The petition, at page 8, says that the decisions below "are in apparent conflict with the decision of this Court in *Ex Parte Collett*, 337 U. S. 55, 59-60 (May 31, 1949)." In the *Collett* case, this Court discussed the question whether Congress intended Section 1404(a) to be applicable to actions under the Federal Employers' Liability Act and decided in the affirmative. The Court thereupon denied the

application. The Court did not make any decision or express any views as to the standard to be applied under Section 1404(a).

The petition, at pages 18-21, leans most heavily on the *National City Lines* case. Petitioners state that the present case is

> "* * * squarely within the holding in *United States* v. *National City Lines,* 80 F. Supp. 734 (S. D. Cal., 1948), motion for leave to file petition for certiorari denied 337 U. S. 78 (1949)" (p. 19 of petition).

The most casual look at the decisions will disprove this assertion, and will show that Judge Yankwich held defendants to a stricter burden of proof than Judge Ryan.

The first decision was in the criminal case, where Judge Yankwich granted the motion to transfer under 18 U. S. C. A. Section 687, saying:

> "Altogether the facts spell out the vexatiousness and oppressiveness which the Supreme Court has warned us to eschew in matters of this character." (7 F. R. D. 393, 402-3 (S. D. Cal. 1947).)

Then came the decision in the civil case granting the motions under the doctrine of *forum non conveniens.* Judge Yankwich said:

> "That the facts in this case call for the application of the doctrine of *forum non conveniens* is apparent from the nature of the action and from the analysis of the facts presented in the affidavits which I made in the companion criminal prosecution. Practically the same affidavits are before me now" (7 F. R. D. 456, 465 (S. D. Cal. 1947)).

On appeal this Court reversed on the point of law that there was no power to dismiss an antitrust case on the doctrine of *forum non conveniens*. This Court did not discuss the facts or the substantive legal standard to be applied to the facts. 334 U. S. 573 (1948).

Section 1404(a) was enacted. Defendants made motions under it and the motions were granted on October 12, 1948. Judge Yankwich said:

> "The factual situation did not change while the matter was before the Supreme Court. It is the same as existed when I granted the motion to dismiss. The affidavits filed with the prior motion have been refiled and adopted for the purposes of the present motions" (80 F. Supp. 734, 743).

Again this Court considered solely the point of law whether the Section was applicable to an antitrust case. Holding that it was, the Court denied leave to file a certiorari petition. The Court did not discuss the facts or the substantive legal standard to be applied. 337 U. S. 78 (1949).

The decisions of the Fourth and Fifth Circuits.

The petition, at page 11, asserts that the decisions in the instant case are in conflict with the decisions of the Fourth and Fifth Circuits in *Jiffy Lubricator Company* v. *Stewart-Warner Corp.* and *Amalgamated Assn.* v. *Southern Bus Lines, supra.*

The argument in support of this proposition is at pages 16-17 of the petition. It does not state what the decisions were in those two cases, and just quotes dicta to the general effect that transfer of a case is less drastic than dismissal and the District Court may have a broader discretion in ordering transfer.

In the *Jiffy* case, the decision was that an order transferring a case under Section 1404(a) was not appealable and that even if it were appealable the appeal should be dismissed as presenting no question of substance for the consideration of the Court of Appeals. The Court said:

> "Whether the Judge below should have removed the case was a matter resting in his own discretion" (p. 362).

The *Amalgamated* case did not involve any motions under Section 1404(a). There were judgments granting motions to dismiss the complaint for lack of venue and to dismiss under the doctrine of *forum non conveniens.* On appeal, the judgments were set aside and the causes remanded for further proceedings.

IV.

THE FACTS WERE FULLY CONSIDERED BY JUDGE RYAN, WHO HELD THAT "NO BALANCE CAN BE STRUCK WITH ANY DEGREE OF CERTAINTY AND FAIRNESS".

The greater part of Judge Ryan's opinion dealt with the facts. Judge Ryan reached his decision

> "* * * on the basis of all the considerations which have been brought to my attention, those which I have discussed as well as those many others urged upon me, too numerous and complex for adequate discussion within the length reasonable for a judicial opinion * * *" (p. 476 of Ex. C).

Judge Ryan found:

> "Further, New York has a substantial contact with the litigation in that important parts of the con-

spiracy are alleged to have occurred in New York" (p. 476 of Ex. C).

Judge Ryan, in his two opinions, found New York to be the more convenient forum for the trial of certain important issues and no less convenient than Detroit as to other issues.

The Court of Appeals likewise reviewed the facts, although in much briefer compass, and found that there was much to support our showing

> "* * * that New York may be as 'convenient' as Detroit if not more so" (R. page 39, footnote 5a).

Rule 52(a) of the Federal Rules of Civil Procedure, adopted by this Court, provides:

> "Findings of fact shall not be set aside unless clearly erroneous * * *"

This rule embodies a sound principle in the administration of justice. It was recently applied in *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949), where Mr. Justice Jackson, writing for the Court said:

> "Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'" (p. 342).

Sherman Tractor & Equipment Company.

Judge Ryan in his opinion alluded to the importance of the part played in the alleged conspiracy by the New York defendant, Sherman Tractor & Equipment Company. He mentioned our claim that Sherman participated in 22 allegedly illegal actions set forth in the complaint. He said,

> "While some of these 22 alleged actions seem of relative unimportance, the proof of others would go far to sustain plaintiffs' version of the facts" (p. 469 of Ex. C).

The facts as to the Sherman Tractor & Equipment Company are mentioned in Judge Ryan's opinion on the earlier motions, 77 F. Supp. 425 at pages 432-3.

The Sherman Company's office is in the Southern District of New York. It has carried on business here for many years and most of its affairs were centered here. It was the New York distributor for the Ferguson Company, prior to the "break".

Eber Sherman, of all the conspirators, had intimate knowledge of the business of the Ferguson Company and its distributors and suppliers. He was the first president of the corporate plaintiff; the name was originally "Ferguson-Sherman Manufacturing Corporation" and was changed to "Harry Ferguson, Inc." in 1942.

After the "break" the defendant Sherman Company got all of the Ferguson dealers in this area to break with Ferguson.

Hugh S. Jenkins, Sales Manager for Sherman, told his assistants to have each dealer in this area sign a "Termination Letter" addressed to Ferguson and also sign a "Letter of Intent" with Dearborn. The instructions included this paragraph (Ex. J to the Sonnett affidavit):

> "Do not, under any circumstances, leave the Termination Letter in the dealers place for him to write and send in at a later date. Stay with him until it is written, as outlined above. Then send us the original and one copy, together with one copy of the Letter of Intent."

Jenkins verified an affidavit for us in March, 1948. In July, 1949, we tried to get Jenkins to make a further affidavit

to include additional information he had furnished relating to New York activities. But he refused to sign. Meanwhile Ford Motor Company had given his prospective son-in-law a job (pp. 282, 294-306 of Ex. C).

Sherman died a year after the complaint was filed; but Jenkins still lives in White Plains.

Judge Ryan stated:

> "(1) Plaintiffs, emphasizing the importance of Sherman Tractor Co. and the death of its president, have submitted convincing affidavits of the hostility of a witness—one, Hugh Stanley Jenkins. Jenkins was a long time associate of the deceased, Eber Sherman, and is a potential source of important proof for plaintiffs if his testimony can be compelled. This court can, but a Detroit court cannot, compel his attendance and testimony. Plaintiffs should not be deprived of the opportunity to exploit this source of proof in attempting to demonstrate the validity of their claims" (p. 473 of Ex. C).

Failure of Ferguson financing.

In his decision Judge Ryan referred to "the failure of their financing efforts allegedly caused by defendants' interference" (p. 470 of Ex. C). He gave this as the first factor in the showing by plaintiffs which "* * * renders defendants' burden all but insurmountable" (p. 471 of Ex. C).

Judge Ryan said in his decision on the earlier motions:

> "Another matter alleged is plaintiffs' efforts through a financier in New York to raise capital after the split with Ford. These negotiations were had in New York; most of the relevant evidence on this issue is very likely within this district, which is the recognized investment market of the world. Therefore, as to these items of proof New York is clearly

the most convenient place" (77 F. Supp. 425, at p. 434).

After the "break", the Ferguson Company came to New York to obtain capital in order to produce its own tractor. The Ferguson Company negotiated with several investment banking firms and insurance companies here.

In February, 1947, the Company bought a plant located in Cleveland, Ohio. At the same time the Company entered into a contract for the underwriting of $7,700,000 of its stock. That contract was with F. Eberstadt & Co. Inc., of New York City, and Watling, Lerchen & Co. of Detroit.

Mr. Eberstadt's affidavit states:

> "My firm worked intensively for a period of several weeks on this underwriting. These efforts occupied much of my own time and of several others in my firm. All this activity was centered largely in New York City" (p. 285 of Ex. C).

This proposed underwriting was announced formally to the financial world at the Bankers Club, 120 Broadway, New York, N. Y., on March 4, 1947. Present at that meeting were representatives of well over seventy brokerage houses (listed at pp. 389-392 of Ex. C).

During the examination of Horace D'Angelo, Executive Vice President of the Ferguson Company, defendants devoted 2,000 pages to the failure of the financing.

The financing was called off at a meeting held on April 22, 1947 in Mr. Eberstadt's office in New York City. Over the preceding week-end, the Ferguson Company had found that the defendants had succeeded in pirating the Ferguson distributor-dealer organization. Mr. Eberstadt and Mr. Loud and members of his staff were present at that meeting with the representatives of the Ferguson Company.

Petitioners have now conducted an examination of Mr. Eberstadt here in New York.

There was a Detroit firm, Watling, Lerchen & Co., associated in the underwriting contract. The controversy is as to why the financing was called of; and no representative of Watling, Lerchen & Co. was even present at the all-important meeting in Mr. Eberstadt's office.

New manufacturer for the tractor.

The next factor listed by Judge Ryan was "New York or non-Detroit sources of proof in relation to the efforts of Ferguson to obtain a new tractor manufacturer" (p. 471 of Ex. C).

When the Ferguson Company was forced to call off the financing, it had to drop its program to produce its own tractor at the Cleveland plant. Thereupon it carried on negotiations to see if it could get a new manufacturer for the tractor.

In this connection also Mr. Eberstadt was active. He says in his affidavit:

> "I played a large part in these efforts. Over the course of several weeks I talked with representatives of a large number of companies. This activity occupied a large part of my time and was likewise centered principally in New York City" (p. 285 of Ex. C).

Many meetings were held in or near New York City with representatives of companies named at page 107 of Exhibit C.

Mr. Guy Vaughn has now been examined in New York City and given important testimony in this connection. He was chairman of the board of directors of Curtiss-Wright at the time in question. He took an enthusiastic

interest in the Ferguson Company until he had a talk with Mr. Ernest Breech, Executive Vice President of Ford Motor Company—whereupon Mr. Vaughn lost interest (pp. 143-4 of the Eberstadt deposition).

Ford, Bacon & Davis.

Judge Ryan next alluded to "the Ford, Bacon and Davis surveys of defendants' tractor operations prior to the 'break' " (p. 471 of Ex. C).

Ford has alleged in its counterclaim that it suffered losses of $27,000,000. (Par. 19 of Counterclaim in the Ford Amended Answer, Ex. B.)

Prior to the "break" the Ferguson Company retained Ford, Bacon & Davis, Inc. to make a study of Ford's costs in manufacturing the Ferguson tractor. Their report is attached as Exhibit V to the Sonnett affidavit verified July 19, 1949 (pp. 108-9 of Ex. C). It was critical of the manufacturing and cost accounting methods of the Ford Company and showed that Ford's alleged losses in making the tractor were attributable to their inefficiency.

The report emanated from the Ford, Bacon & Davis offices at 39 Broadway, New York City. The witnesses and files are located in New York.

Petitioners have now conducted examinations of Mr. James F. Towers and Mr. C. J. Abbott, senior executives of Ford, Bacon & Davis, here in New York City.

Development of the Ferguson System.

One major part of the case is that the tractor and line of implements were developed by Ferguson in Ireland and belonged to him. Our witnesses on that issue will come from Ireland and England (See our list of prospective witnesses, p. 335 of Ex. C).

At the present time the Special Master and several lawyers on both sides of the case have just returned from abroad. Petitioners have spent several weeks in England and Ireland where they have examined a total of eleven witnesses. We objected to the expedition on the ground that it would interfere with the schedule of examinations being conducted in New York City and other places and might delay the trial. Petitioners insisted that the foreign depositions were vital in their preparation for trial, and the Special Master and the District Court overruled our objections.

Distributors and dealers and suppliers.

Another major part of the case is our claim that the defendants coerced and took over the organization of distributors and dealers which the Ferguson Company had built up and trained over a period of eight years. Also, the defendants induced a number of implement manufacturers to break off their arrangements with Ferguson (pp. 111-14 of Ex. C).

The sources of proof are located all over the country, and our witnesses will be representative and will include but few if any from Detroit. Our list of prospective witnesses on this part of the case is at pages 336-339 of Exhibit C.

Petitioners urged the greater proximity of Detroit to many sources of proof. With respect to this point, Judge Ryan made the statement quoted below at page 35.

Other New York "spear bearers".

Petitioners' counsel, on the oral argument in the Court of Appeals, characterized the witnesses located in New

York City as being like "spear bearers" in Shakespearean productions.

We have already mentioned a few of the New York witnesses that petitioners refer to as "spear bearers", such as Jenkins, Eberstadt, Vaughn, Towers, and Abbott.

Many others would be included—for example, Mr. L. R. Guylay, public relations counsel retained by the Ferguson Company at the time the complaint was filed, and also Mr. Fred Eldean, public relations counsel some years previously retained. Petitioners have examined Mr. Guylay and are scheduled to examine Mr. Eldean. Both are located in New York City.

The extraordinary counterclaim in the amended answer alleges that the Ferguson Company retained public relations counsel to conduct throughout the United States and Great Britain a malicious and defamatory campaign of propaganda against the defendants. (See par. 39 et seq. of counterclaim in Ford Amended Answer, Ex. B.) If petitioners regard Guylay and Eldean as "spear bearers", then their counterclaim is sham.

Another example is Mr. Clinton Davidson of Management Planning, Inc., 20 Pine Street, New York, N. Y. He formulated the first plan to set up a new company (Dearborn Motors Corporation) to distribute tractors made by Ford, and the most important conference on that plan was at the Ritz Carlton Hotel in New York City. Mr. Davidson is a hostile witness.

Commercial Investment Trust, a New York corporation, is referred to in Judge Ryan's opinion (p. 471 of Ex. C). Its subsidiary Universal Commercial Investment Trust is headed by a principal defendant, Ernest C. Kanzler. U. C. I. T. has assisted in the conspiracy by various means including the loaning of money to Dearborn distributors

and the financing of Dearborn tractor sales on more satisfactory terms than had been given to Ferguson.

C. I. T. itself bought all of the preferred stock issued by Dearborn Motors Corporation. Conferences in that connection were held at the C. I. T. offices, 1 Park Avenue, New York, N. Y.

One of the most serious steps Ford took in its campaign to destroy the Ferguson Company was to publish an advertisement in several national magazines, notifying everyone of the Ford Company's intentions. That advertisement was handled by the New York advertising agency of J. Walter Thompson & Co. The witnesses and files are located in New York City.

"Variable, uncertain factors"

Judge Ryan in his decision found that it was not possible to strike a balance with any degree of certainty and fairness. One reason was that there were "variable, uncertain factors"—in other words, that at the time of the motions to transfer the case all of the factors were not fully known and fixed.

Judge Ryan knew full well that important changes in the factual aspects of the matter had already occurred during the time elapsing since his decision on the earlier motions.

The point is best illustrated by brief reference to one William J. Sands. At the time of the earlier motions the name of Sands was not even mentioned—whereas by the time of the present motions the "Sands affair" was a prominent factor, and Judge Ryan in his decision included "the [illegible]-Detroit Sands affair" as one of the factors on which he reached the conclusion:

> "Such a showing by plaintiffs renders defendants' burden all but insurmountable" (p. 471 of Ex. C).

Sands lives in Belfast, Northern Ireland. He was Ferguson's chief engineer and had been in close association with Ferguson from the beginning.

After this complaint was filed, petitioners induced Sands to leave Ferguson's employ and to come to New York City, where Sands turned over to petitioners large numbers of most confidential documents obtained by him as Ferguson's trusted employee (p. 78-9 of Ex. C).

Petitioners have now alleged that Sands, rather than Ferguson, was the true inventor of the basic Ferguson concepts and ideas (par. 11 of the Counterclaim in the Ford Amended Answer, Ex. B).

Petitioners' contentions.

The petition at page 22 has this caption:

> "The facts before the Courts below constituted clear proof of the superior convenience of the forum to which transfer was requested."

In this connection we may quote the following observation made by Mr. Justice Black, dissenting, in *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501, 516 (1947):

> "It will be a poorly represented multi-state defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of the action against him is most inconvenient."

No one would suggest that Ford Motor Company is "poorly represented" in this litigation.

Convenience of Henry Ford II. The point petitioners have most strongly urged is that Henry Ford II and other executives must attend the trial, and that they would be

inconvenienced if the trial is in New York City. They say that Henry Ford II and Breech and other executives of the Ford and Dearborn companies must sit in the court room throughout, or substantially throughout, the trial (Petition, p. 23-24).

On this point Judge Ryan said:

> ". . . a good part of this inconvenience would exist wherever the action was tried" (p. 474 of Ex. C).

Judge Ryan also said that this controversy

> ". . . results from the alleged activities of defendants or their agents in this district and elsewhere, outside Detroit as well as within. Since their activities extend far beyond the confines of Detroit they run the risk of lawsuits outside that city" (p. 474 of Ex. C).

On this point Frank, Circuit Judge, said:

> "We think there will be no great interference with the Ford business if Ford officials must come to New York from Detroit to testify" (R. 38).

The inconvenience claimed by petitioners would be a self-imposed inconvenience. They are represented by able and experienced New York counsel, the firms of Simpson, Thacher & Bartlett, Cravath, Swaine & Moore, Fish, Richardson & Neave and Duncombe & Pleasants. Seldom do corporate executives impose upon themselves the burden of sitting through a civil trial.

In judging the sincerity of petitioners' argument, the Court may note that Henry Ford II spends a considerable portion of his time vacationing in such places as Sun Valley, Idaho, Hobe Sound, Florida, and Southampton, Long Island, where he and his wife own and maintain a summer home. He and other Ford executives make numerous

speeches and appearances at gatherings in New York City and elsewhere (p. 96 of Exhibit C).

Convenience of witnesses. Our list of prospective witnesses is printed at pages 335-343 of Exhibit C. Petitioners' list of prospective witnesses is printed at pages 322-334 of Exhibit C.

Judge Ryan considered petitioners' argument as to "the greater proximity of Detroit to most of the sources of proof", and with respect to that argument he said:

> "The third raises issues composed of a combination of individual factors with so many variables that their resolution is all but impossible. To sustain defendants on the third ground, I would be obliged to decide how many witnesses are closer and to what extent to Detroit; whether their evidence is actually to be used (since neither side binds itself to call any or all of them); whether, although Detroit is closer, New York is more easily accessible because of superior transportation facilities; and so on. For example, suppliers involved in this case come from Detroit, Pennsylvania, Nebraska, Ohio, Illinois, Texas, South Dakota, Iowa and California. The distributors and dealers are more numerous and equally well dispersed. Of course, all of them will not be called as witnesses; which will and which will not is unclear. With such a confusion of factors, no balance of convenience can be struck with any degree of certainty or fairness, and were it to be attempted the result would be a tentative balance based upon variable facts which for all concerned might or might not represent an accurate appraisal of the relative convenience of conducting the trial at one or another of two alternative forums. The case is different when the witnesses to an accident are all to be found in one place. (Cf. *Ex parte Collett, supra*)" (R. 25).

Production of documents. Petitioners, as a further ground of inconvenience, refer to "the location in Detroit of voluminous records to be made a part of the proof" (See petition, p. 27).

The documents and records have been microfilmed and the originals immediately returned to the party producing them. This procedure has recently been extended to include many thousands of documents located in the British Isles which petitioners asserted were of first importance in their preparation for trial.

Both parties have, in New York City, complete sets of the microfilms of all the documents so inspected. Microfilm enlargements of documents have been marked as exhibits for identification and used during the taking of depositions, and it was not necessary to have the original documents brought to New York.

We have offered to make an appropriate stipulation in this connection. If there should be some difficulty, it will be a matter to be settled at a pre-trial conference.

Conclusion.

The petition for the issuance of a writ of certiorari should be in all respects denied.

September 29, 1950.

Respectfully submitted,

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Office - Supreme Court
FILED
OCT 5 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 246

FORD MOTOR COMPANY, HENRY FORD II, ERNEST R. BREECH, JOHN R. DAVIS, DEARBORN MOTORS CORPORATION, ERNEST C. KANZLER and SHERMAN TRACTOR & EQUIPMENT CO., INCORPORATED,

Petitioners,

v.

THE HONORABLE SYLVESTER J. RYAN, UNITED STATES DISTRICT JUDGE and HARRY FERGUSON and HARRY FERGUSON, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF AUTHORITIES

PAGE

Cases

Ferguson v. *Ford Motor Co.*, 77 F. Supp. 425 (S. D. N. Y., 1948) 4

United States v. *National City Lines*, 7 F. R. D. 393 (S. D. Cal., 1947) 3

United States v. *National City Lines*, 80 F. Supp. 734 (S. D. Cal., 1948), *leave to file petition for cert. denied* 337 U. S. 78 (1949) 3

Statute

Title 28 United States Code, section 1404(a) 1, 2, 3

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Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The substantial questions presented for determination by this Court upon the petition for a writ of certiorari result from holdings of the Courts below that transfer of an action depends upon factors other than the convenience of the parties and witnesses, in the interest of justice. Although these are the sole statutory criteria (28 U. S. C. § 1404(a)), decision was not based upon them.

The brief in opposition acknowledges (pp. 16, 19) that the decisions of the District Court and of the Court of Appeals, denying transfer, were predicated on the view

that, additionally, abuse of process or abuse of the venue privilege must be shown in order to warrant transfer. That brief states, at page 19:

> "Thus the decision of both courts was that the venue privilege is one of the factors to be weighed, and that petitioners have not made a good enough showing to overcome the venue privilege.* * *"

It is precisely this holding which the petition for certiorari (pp. 12-18) cites as one of the fundamental misconceptions of applicable statutory law; and the brief in opposition in no way refutes our demonstration in this regard. There is no justification for determination of a motion for transfer, made under the statute, on any other grounds than convenience of parties and witnesses, in the interest of justice. The Courts below, clinging to standards which formerly prevailed under the doctrine *forum non conveniens,* failed to give effect to the distinct change enacted by Congress as 28 U. S. C. § 1404(a). This is a matter of recurring importance in the administration of Federal justice, requiring this Court's authoritative settlement.

Premised upon the erroneous assumption that transfer must be denied in the absence of a showing of abuse by the plaintiffs of a privilege to choose venue, the brief in opposition ignores consideration of the demonstrated superior convenience of the Detroit forum to which transfer is sought. The brief does not challenge the undisputed facts that the center of the controversy is in Detroit; that the principal parties—both plaintiff and defendant—their officers, employees and principal place of business, are located in Detroit; that unnecessary expense and hardship will continue to result because of the distance of the forum from principal sources of proof; and that the convenience

of all parties and the witnesses who, located in Detroit, represent the primary and certain sources of proof on all of the many issues, would be served by transfer of the action to Detroit (Petition, pp. 22-24).

Instead, the brief in opposition (pp. 23-36) consists almost entirely of a labored factual argument directed to the undisputed fact that some of the sources of proof as to some of the issues in the instant case are to be found outside the forum to which transfer is sought. Such a condition is almost inevitable in a case of this magnitude. Its existence in no way impairs the preponderant convenience of the Detroit forum, which remains the principal source of proof even as to matters claimed also to have been manifested elsewhere (Ex. C, pp.: 199-200, 357; 361-5, 16-17, 59-60; 73-4, 169-172; 200, 67; 198-9, 359-361; cf. *United States* v. *National City Lines,* 7 F. R. D. 393, 401 (S. D. Cal., 1947)). It is sufficient reply to this portion of the brief in opposition to refer to the opinions of the Courts below which plainly indicate that transfer was denied, not because the superior convenience to the parties and witnesses of the Detroit forum was in doubt, but because of the understanding of the Courts below of the governing law.

The opposition brief does not dispute the precise factual parallel between this case and *United States* v. *National City Lines,* 80 F. Supp. 734 (S. D. Cal., 1948), motion for leave to file petition for certiorari denied, 337 U. S. 78 (1949). The respondents' claim (pp. 21-22) that the two decisions are not in conflict is refuted not only by the difference in result but also by the opinion in the *National City Lines* case, decided under section 1404(a), which speaks entirely in terms of convenience (80 F. Supp., at p. 744).

The assertion of difficulties in obtaining an impartial jury in Detroit (Brief in Opposition, p. 8) is an endeavor to renew a contention rejected by the District Court in its earlier decision upon the motion made under the doctrine *forum non conveniens* (*Ferguson* v. *Ford Motor Co.*, 77 F. Supp. 425, 428 (S. D. N. Y., 1948)).

For the reasons set forth in the petition heretofore filed with this Court, your petitioners respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit, and that a hearing upon and a determination by this Court of the matters presented be had.

Dated, October 4, 1950.

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